Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:PEN:PHI:TL-N-1563-00
GAThorpe

date:

to: Group Manager E:1407/LBE

from: District Counsel, Pennsylvania District, Philadelphia

subject: [redacted]
EIN: [redacted]

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We are responding to your request for advice, dated March 14, 2000, in which you asked several procedural questions relating to the examination of the above taxpayer's income tax return for the period beginning on January 1, [redacted] and ending on [redacted].

ISSUE

Considering that the taxpayer merged with another corporation after the tax period under examination, who has the authority to sign statute extensions and other documents on the taxpayer's behalf?[1]

CONCLUSIONS/RECOMMENDATIONS

[1] In addition to asking for advice on this issue, you also asked several questions about who would be liable for any additional tax resulting from this examination. The liability issue will be addressed in a separate memorandum.

We believe that the president, vice president(s), treasurer, assistant treasurer, or chief accounting officer of [redacted], or any other person duly authorized to act for that corporation may act for the taxpayer in any federal tax matter for taxable periods predating the merger. Consequently, since it appears that [redacted] is [redacted]'s president, it could be argued that the Forms 2848 he signed on the taxpayer's behalf are valid even though he did not sign them as [redacted]'s president. However, to avoid any argument later on concerning his authority to act on the taxpayer's behalf, we suggest that you have him sign another Form 2848 as president of [redacted] and have him sign any future documents in that capacity. Any form, notice, or agreement should be captioned: [redacted], successor to [redacted].

FACTS

Our understanding of the facts is based on your memorandum and the documents you subsequently provided. If our understanding of the facts is incorrect, please let us know immediately as it may affect the advice we have given.

The taxpayer, a Pennsylvania corporation, was a Subchapter C corporation until [redacted], when it filed a Subchapter S election. It filed a Form 1120 for the taxable period ending September 30, [redacted] and a Form 1120S for the short period ending [redacted]. The taxpayer was an accounting firm, which also provided management consulting services to its clients. [redacted] was the taxpayer's president and managing director, and he was its majority shareholder at that time.

On [redacted], the taxpayer merged with [redacted], an Ohio corporation, with [redacted] continuing as the surviving corporation.[2] [redacted] is a subsidiary of [redacted], a Delaware corporation, which

[2] To comply with state law, a separate corporation, [redacted], was formed to receive the auditing and attestation part of the taxpayer's practice. Although this corporation is not a subsidiary of either [redacted] or its parent, it appears that those companies effectively control it through an administrative services agreement.

was known as [redacted] at the time of the merger. It appears that [redacted] was formed solely to facilitate the merger. The merger documents provide that Ohio law will apply to the merger and that the parties intend that the merger qualify as a tax-free transaction under I.R.C. § 368.[3] The SEC Form 10K filed in [redacted] indicates that [redacted] is the Vice President [redacted] for [redacted] and is the president of [redacted].[4]

You are examining the short-year Form 1120S the taxpayer filed for the period from January 1, [redacted] to [redacted]. The initial appointment letter was sent to the taxpayer at the address shown on its last return. One of the taxpayer's former shareholders (we assume [redacted] responded, and later you received two Forms 2848 signed by [redacted] on the taxpayer's behalf naming another, former shareholder as the taxpayer's representative. He signed one form as the taxpayer's president and the other as a vice president of [redacted].[5]

DISCUSSION

To determine who has the authority to execute agreements on the taxpayer's behalf, we must first consider the effect of the merger on the taxpayer's corporate existence. If the taxpayer

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[3] We express no opinion as to whether the merger qualifies under § 368.

[4] We note that the certificate of merger filed on [redacted] with the Ohio Secretary of State indicates that [redacted] was [redacted]'s [redacted] at that time. If you are not sure that [redacted] is now its president, we recommend that you seek clarification from [redacted]

[5] Although it is not clear from your memorandum, it appears that [redacted] submitted a third Form 2848 for [redacted], which he signed as its president. We believe that this corporation should be treated as a separate taxpayer since it did not merge into [redacted], and thus [redacted] would have the authority to bind the corporation as its president. However, since the corporation was formed at the time of the merger, it is not directly responsible for any additional tax liability for the period under examination except as a transferee of the taxpayer's property.

survived, even for the limited purpose of handling its federal tax affairs, then its duly authorized agents or representatives may act on its behalf. See Popular Library, Inc. v. Commissioner, 39 T.C. 1092 (1963); Praxiteles, Inc. v. Commissioner, T.C. Memo. 1993-622, aff'd without opinion, 70 F.3d 1279 (9th Cir. 1995). See also Rev. Rul. 71-467, 1971-2 C.B. 411. However, if it ceased to exist upon the merger, then its officers, and any other agents who were duly authorized to represent the taxpayer before the merger would no longer have the authority to act on its behalf. Paramount Warrior, Inc. v. Commissioner, T.C. Memo. 1976-400. State law determines whether and to what extent a party to a merger continues to exist after the effective date. Sanderling, Inc. v. Commissioner, 571 F.2d 174 (3d Cir. 1978), aff'g 66 T.C. 743 (1976); United States v. Krueger, 121 F.2d 842 (3d Cir.), cert. denied, 314 U.S. 677 (1941).

Under Pennsylvania law, upon the effective date of a merger, "[t]he separate existence of all corporations parties to the merger or consolidation shall cease, except that of the surviving corporation, in the case of a merger."[6] 15 Pa.C.S.A. § 1929. See Penn Co. for Insurances on Lives and Granting Annuities v. Commissioner, 75 F.2d 719 (3d Cir. 1935)(merged corporation ceased to exist for federal tax purposes). A merger becomes effective upon the filing of the articles of merger with the Pennsylvania Department of State or upon the effective date set forth in the plan, whichever is later. 15 Pa.C.S.A. § 1928. Thus, since the taxpayer ceased to exist on June 30, 1997, the date upon which the articles of merger were filed with the Department of State, it may not engage in any activities, including representing itself during a federal tax examination or any subsequent litigation. This means that the taxpayer's former officers lack the ability to appoint third parties to represent the taxpayer during the examination or to enter into agreements and waivers -- such as statute extensions, waivers of the limitation on assessment and collection, and closing agreements -- on the taxpayer's behalf.

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[6] We believe that the effect of the merger on the taxpayer's corporate existence should be determined under Pennsylvania law since the taxpayer was incorporated in that state. See Oklahoma Gas Co. v. Oklahoma, 273 U.S. 257, 259-60 (1927). We believe, however, that the result would be the same under Ohio law as its statute covering mergers is very similar to Pennsylvania's. See OHIO REV. CODE ANN. § 1701.82 (Anderson 1999).

The Service has taken the position that, in cases involving mergers or consolidations, the surviving corporation has the authority to extend the statute for any of its constituent corporations for any taxable period predating the merger or consolidation.[7] Rev. Rul. 59-399, 1959-2 C.B. 488. Similarly, the courts, applying state law, have reached the same conclusion. See, e.g., Phillips v. Lyman H. Howe Films Co., 33 F.2d 891 (3d Cir. 1929)(statute extension signed by the surviving corporation valid for purposes of extending the period in which it could file a claim for refund for an overpayment made by one of the merged corporations); Pleasanton Gravel Co. v. Commissioner, 85 T.C. 839 (1985). Therefore, we believe that [redacted], as the surviving corporation in the merger, has the authority to enter into agreements and grant powers of attorney for any of the taxpayer's pre-merger tax periods.[8]

Since [redacted] can only act through its agents, we must now determine who has the authority to actually sign agreements, waivers, and powers of attorney for the corporation regarding the taxpayer's pre-merger tax periods. Again, we must look to state law to resolve this issue. See Sanderling, Inc., 571 F.2d at 176-77 (66 T.C. at 750); Krueger, 121 F.2d at 844; Pleasanton Gravel Co., 85 T.C. at 853. Under Ohio law, unless the articles of incorporation or the corporate regulations (bylaws) otherwise provide, the board of directors determines the scope of each officer's authority. OHIO REV. CODE ANN. § 1701.64 (Anderson 1999).[9] However, even when an agent of the corporation lacks actual authority, he may have "implied authority" or "apparent authority" if the board, by its actions or inaction, makes it

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[7] We believe that this authority would extend to other agreements and waivers, such as waivers of the restriction on assessment and collection, and closing agreements.

[8] Under the regulations relating to consolidated returns, the parent is the agent for all of its subsidiaries for federal tax purposes. Treas. Reg. § 1.1502-77(a). But even if [redacted] and its subsidiaries file consolidated returns, it is not the taxpayer's or [redacted]'s agent here because the examination involves pre-merger tax periods.

[9] We believe that the scope of [redacted]'s officer's authority must be determined under Ohio law since it was incorporated in that state. See Oklahoma Gas Co., 273 U.S. at 259-60.

appear that the agent has such authority. See Miller v. The Wick Building Co., 93 N.E.2d 467 (Ohio 1950); Kroeger v. Brody, 200 N.E. 836 (Ohio 1936). Generally, the corporate president is presumed to have the authority to act for the corporation in its day-to-day business affairs, which includes routine tax matters. See Miller, 93 N.E.2d at 473; Kroeger, 200 N.E. at 838. We believe that a corporation's treasurer, chief accounting officer, or any other employee the corporation has selected to manage its tax matters also has at least the implied or apparent authority to execute routine agreements and other documents (statute extensions, assessment waivers, powers of attorney, etc.) for the corporation. Regarding statute extensions, the Service has determined that the persons authorized under I.R.C. § 6062 to sign corporate income tax returns may also sign statute extensions on the corporation's behalf even if the person signing the extension is not the person who signed the return. Rev. Rul. 83-41, 1983-1 C.B. 349. Section 6062 provides that the corporation's income tax return must be signed by its "president, vice-president, treasurer, assistant treasurer, chief accounting officer, or any other officer duly authorized so to act." We believe that the revenue ruling simply applies the general rule followed by the courts recognizing that the persons listed in § 6062 would in the vast majority of cases possess at least the implied or apparent authority to execute statute extensions on a corporation's behalf. However, for more significant agreements, such as closing agreements or other settlement agreements, we recommend that you obtain proof that the person signing the agreement on the corporation's behalf has obtained the board of director's authorization.

Finally, we recommend that you obtain a new power of attorney signed by [redacted] in his capacity as president of [redacted]. We could argue that the powers of attorney he previously signed as the taxpayer's president, as president of [redacted]'s, and as vice president of [redacted] are valid since he is also the president of [redacted]. See Sanderling, 571 F.2d at 177; Bugaboo Timber Co. v. Commissioner, 101 T.C. 474, 487 (1993). But see Paramount Warrior, Inc., T.C. Memo. 1976-400. However, we believe that it would be best to obtain forms properly captioned and signed to avoid any potential argument that they were not properly executed.

As we indicated above, we have not closed our file because we will respond to the other questions you asked in a separate memorandum. Should you have any questions about the advice we have given you in this memorandum, please contact Gerald A. Thorpe at (215) 597-3442. This memorandum has been submitted to

our National Office under the post 10-day review procedures. Consequently, we recommend that you do not rely on this advice until the 10-day review period lapses.

JOSEPH M. ABELE
Assistant District Counsel